1955

P. S. Guss dba Photo Sound Products Manufacturing Company v. Utah Labor Relations Board and United Steelworkers of America, CIO : Brief of Respondents

Utah Supreme Court

E. R. Callister; Raymond W. Gee; A. W. Sandack; Attorneys for Respondents;

IN THE SUPREME COURT
of the
STATE OF UTAH

P. S. GUSS, dba PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

— vs. —

UTAH LABOR RELATIONS BOARD and UNITED STEELWORKERS OF AMERICA, CIO,

Respondents.

Case No. 8393

RESPONDENTS' BRIEF

E. R. CALLISTER
Attorney General

RAYMOND W. GEE
Assistant Attorney General

A. W. SANDACK
Attorneys for Respondents

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STATEMENT OF FACTS

To supplement appellant's Statement of Facts, the respondent adopts Trial Examiner Robert J. Shaughnessy's Intermediate Report, upon which the Utah State Labor Board based its Findings of Fact and Order (Record, 316):

HISTORY OF THE CASE—JURISDICTION

The Respondent, Phillip S. Guss, dba Photo Sound Manufacturing Company, is engaged in the manufac-*

ture of specialized equipment for the United States Air Force on a contract basis. The amount of these contracts with the Government or its agencies totaled $152,025.50.

On December 1, 1953, *the Petitioner herein filed a Petition (Bd. Exhibit No.* 1) *for Certification of Representatives with the National Labor Relations Board involving the employees of the Respondent. Pursuant to this Petition, an Agreement for consent election (Bd. Exhibit No.* 3) *was signed, an Election conducted on April* 26, 1954, *a Tally of Ballots issued April* 26, 1954 *and a Certification of Representatives dated May* 4, 1954. *All of the foregoing was handled by and through the National Labor Relations Board, 20th Region.*

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*At the hearing below Photo Sound Products Manufacturing Company (the Appellant herein) is designated as the Respondent, and United Steel-Workers of America, CIO (the Respondent herein) was designated as the Claimant and Petitioner in the hearing below.

After a series of attempts at negotiating a contract by the Petitioner and Respondent, an Unfair Labor Practice Charge (Resp. Exhibit No. 7) *was filed against the Respondent by the Petitioner on May* 17, 1954. *Following the filing of this Charge, the Acting Regional Director of the 20th Region of the N.L.R.B. issued a letter (Comp. Exhibit No.* 9) *dated July* 21, 1954, *in which he declared, "Further proceedings are not warranted, inasmuch as the operations of the Company involved are predominantly local in character, and it does not appear that it would effectuate the policies of the*

Act to exercise jurisdiction. I am, therefore, refusing to issue complaint in this matter." No appeal or other proceedings were taken thereafter by either party and the decision became final.

Following this decision, the Petitioner filed charges with the Utah Labor Relations Board alleging in substance the same matters as filed before the N.L.R.B. The Petitioner's position is that the refusal of the N.L.R.B. to act confers jurisdiction on this Board to act. The Respondent's position is that the employer is in fact engaged in interstate commerce, subject to the N.L.R.B. and by Federal preemption in this field, the Utah Labor Relations Board cannot act.

It must be conceded that the Respondent is manufacturing products almost all of which are shipped outside the State of Utah. It is also true that a large amount of the dollars expended in performing these contracts are spent for labor and the purchase of materials on a local level. It is thus apparent that intrastate commerce as well as interstate commerce is affected by this dispute.

It is important that consideration must be given to the fact that in the original representation proceeding the Certification was issued on the basis of a "consent Election." In this proceeding there was no administrative or judicial determination by the N.L.R.B. or its agents that the Respondent's operation was sufficient to warrant the N.L.R.B. to assume jurisdiction. The parties merely agreed that they were subject to the National Labor Relations Act.

Pursuant to the filing of the Unfair Labor Practice Charge by the Complainant before the N.L.R.B., the first expression of administrative determination of the question of jurisdiction occurred when the Regional Director of the N.L.R.B. stated . . . "the operations of the Company involved are predominately local in character, and it does not appear that it would effectuate the policies of the Act to exercise jurisdiction." It appears that here we have an expression by a lack of jurisdiction on the part of the N.L.R.B. and such expression became final when no appeal was taken. The N.L.R.B. and the parties to this proceeding apparently agreed that the activities of the Respondent are primarily local in character. The Hearing Referee must agree.

As was stated by our Supreme Court in Utah Labor Relations Board vs. Utah Valley Hospital, 235 *Pac. 2d* 520:

> *"It would seem paradoxical indeed to hold as defendant urges us to do, that the hospital is beyond the control of the Utah Legislature because it is controlled by an Act of Congress, which by its very terms excludes the hospital from its operation."*

As was aptly pointed out by the New York State Labor Relations Board in a somewhat similar situation in the case of Matter of B.F.O.E. of the United States vs. N.Y.S.L.R.B., 17 *S.L.R.B.* 61:

> *"Exclusion of organizations such as Respondents from the coverage of the Act: " . . . would not immunize them from labor disputes, for it*

would not deprive the employees of the right to join a union or to engage in concerted activities. The sole effect would be to make unavailable the procedures for peaceful adjustments of labor disputes, which the Legislature has provided in the Act, and regulate the employees to economic action to obtain recognition and negotiations. The purpose of the Act is to substitute the peaceful procedures provided therein for the economic warfare which results from the refusal of employers engaged in commercial activities to negotiate with the representatives of their employees."

The Hearing Examiner must, therefore, conclude that the business of the Respondent affects intrastate commerce, or the orderly operation of industry within the State of Utah, and since the N.L.R.B. has refused jurisdiction, therefore the Utah Labor Relations Board has jurisdiction.

THE UNFAIR LABOR PRACTICES

1. *THE DISCHARGES.*

1. *Charles Illsley was employed by the Respondent in October of* 1953. *The following month he signed a union authorization card. He became active immediately in promoting the Union among fellow employees. He acted as the Union observer at the time of the N.L.R.B. election. He later became a member of the Union negotiating committee and grievance committee. He participated in virtually all negotiations that were held between the Company and the Union until negotiations*

ceased. Illsley was discharged in August 1954 *after negotiations had broken off and the N.L.R.B. had refused to issue a complaint.*

After the advent of the organization campaign it seems from all the evidence that a general attitude of anti-union conduct developed on the part of management towards the infant union. Negotiations were not satisfactory. The Respondent failed to give proper attention to the request of the Union for meetings or discussions on grievances. Since Mr. Illsley was spearheading the Union movement in all these fields, it follows that because of the general anti-union attitude of the Respondent they were most anxious to see him discharged.

In point of seniority in his classification he was the oldest employee of the Respondent. His successor was another employee of the Respondent that did not work for Photo Sound but an entirely separate operation that the Respondent maintained elsewhere.

The Referee finds and concludes that Charles Illsley was discharged solely because of his activities for and on behalf of the complainant Union.

2. *Gary Watrous was employed as a clerk and stock record keeper in the production shop and had been so employed since July* 15, 1953. *Mr. Watrous had attended a meeting of the Union at which the Respondent's manager, Mr. Garber, spoke. He had met in cars outside Respondent's place of business with the Union Representative, Mr. Mullet, and had been observed by Mr. Garber, who also knew the occupation and purpose of Mr.*

Mullet. After obtaining permission for a two-week leave of absence for active duty with the Navy, the applicant found on his return that he had been replaced by someone from some other operation carried on by Mr. Guss. Prior to his departure for the Navy, Mr. Watrous had been questioned by Mr. Gerber as to how he had voted in the election. As will later appear, Mr. Gerber was known as being opposed to the Union.

The Referee finds and concludes that Mr. Watrous had been discharged for his activities for and on behalf of the Union.

* * * *

5. *Victor Sismondi was employed in October of* 1953 *and discharged in April of* 1954. *The management of the Respondent advised him that he had been discharged for sloppy work. Apparently a number of valves were not properly cut and Sismondi was blamed for this error. Sismondi's activities in connection with the Union consisted primarily in signing a union designation card and distributing cards to other employees. He met with the Union Representative on a number of occasions and attended meetings with other employees. His employment lasted seven months. It seems difficult to the Referee to employ a machinist for such a period and at that time discover that he was not qualified to do the job. Such a shortcoming seems reasonable to determine after a few weeks of employment let alone seven months. It would appear that management had knowledge of the fact that Sismondi was a member of the Union and at*

best picked a poor time to discharge him immediately prior to the election.

In consideration of the entire attitude of the Respondent towards the Union in general and to certain of the employees who were definitely active on behalf of the Union, it is the finding of the undersigned that Victor Sismondi was discharged for Union activity.

6. *The Union made a claim on behalf of Clisbee Lymon, another member of the Union, that he was discharged for Union activities, but the most that can be said for this was the evidence was entirely hearsay and none of a substantial nature on which a finding could be based. The Trial Examiner concludes that there is no evidence to support a finding that Clisbee Lyman was discharged for activities associated with the Union.*

7. *The Union disclaimed any interest in Max Whitman, one of the employees named in the Complaint and Charge and therefore the Complaint should be dismissed as to him.*

2. *THE INTERFERENCE WITH THE RIGHTS OF THE EMPLOYEES.*

The record shows from the outset a long series of instances by the Respondent or his representatives in making statements to individual employees and to the employees as a group that tended to interfere with their right to make a free choice of their bargaining representative. In the fact of this discrimination and intimidation of the employees, the employees neverthe-

less designated the United Steelworkers of America as their bargaining agent.

The Trial Examiner must conclude from the evidence submitted that in the face of threats of reprisal if the election showed a majority for the Union, the employees overcame such threats and designated the Union as their bargaining representative. Thus the question of interference becomes moot.

3. *THE REFUSAL TO BARGAIN.*

Following the Certification by the N.L.R.B. the Union requested an immediate meeting for the purpose of negotiating a contract. A number of letters and phone calls were made, meetings set and cancelled until finally an Unfair Labor Practice Charge was filed with the N.L.R.B.

Following this a meeting was held on June 1, 1954 *in the office of the Respondent's attorney, Peter M. Billings. Mr. Rasmussen, the Union's representative, supplied a proposed contract on behalf of the Union and represented that the matter was open for negotiations. Mr. Rasmussen also provided a proposed interim agreement for handling grievances. The matter was discussed generally with reference to general matters in the contract.*

Another meeting was held June 23, 1954 *and at this meeting the interim agreement for handling grievances was signed. Shortly thereafter, the Respondent's attorney left town and did not return until August* 11, 1954

at which time he found a letter from the Union requesting a meeting either the 11th, 12th or 13th of August. At the same time, the Respondent and his Attorney received word from the N.L.R.B. that they would not assume jurisdiction of the unfair labor practice charge previously filed by the Union.

In the face of a request for a meeting to negotiate the contract by the Union on any one of three days, the Respondent ignored the request and by Counsel's own statement decided "that the Steelworkers were dropping the matter of negotiation, because we had no further request." From this time on, in spite of an open request for bargaining sessions, the Respondent made no further effort to contact either the Steelworker's Union or a member of the negotiating committee of Respondent's place of business.

The Trail Examiner can only conclude that after the N.L.R.B. decision, the Respondents had no further intention of meeting or attempting to negotiate a contract. It must also be found that the request for meetings were reasonable as to number, time and place. For these reasons the record supports a finding that the Respondent has since on or before refused to bargain collectively with the duly designated representative of their employees.

The Trial Examiner then recommended, and the Utah Labor Relations Board ordered:

1. *Phil S. Guss dba Photo Sound Products Mfg. Co. cease and desist from refusing to bargain collectively*

with United Steelworkers of America as the exclusive bargaining representative of his employees employed at his place of business, 264 East 1st South, Salt Lake City, Utah, in respect to rates of pay, hours of employment and other conditions of employment.

2. *Take the following affirmative action which the Trial Examiner finds is necessary to effectuate the policies of the Act:*

(*a*) *Upon request, bargain collectively with United Steelworkers of America as the exclusive bargaining representative of his employees employed by the Respondent at 264 East 1st South, Salt Lake City, Utah, in respect to rates of pay, hours of employment and other conditions of employment.*

(*b*) *Upon application, either personally or through their bargaining representative, immediately and fully reinstate Charles Illsley, Gary Watrous and Charles Sismondi to their former positions with Respondent held by them prior to the dates of their discharge without prejudice to any rights or privileges previously enjoyed by each of them, discharging, if necessary, any person or persons employed in the place of each since their discharge.*

(*c*) *Make whole each of the employees named in paragraph (b) above for any loss of wages that may have occurred from the time of their discharge until they are fully reinstated. Employer to receive*

credit for all earnings from all sources during the time between the date of their discharge and the time of their reinstatement.

(d) Post immediately, in plain sight, and leave posted for a period of thirty consecutive days from the first day of posting, in a conspicious place in Respondent's premises, a copy of the Board's Order together with an appropriate notice to its employees in a form to be determined by the Board.

Notwithstanding the Labor Board's mandate, the employer ignored the entire order, resting his refusal upon the ground the National Labor Relations Board has exclusive jurisdiction of his employment activities.

STATEMENT OF POINTS

The question presented here is whether the Utah State Labor Relations Board may take a case affecting interstate commerce after the National Labor Relations Board has declined to decide the controversy because of its jurisdictional policy.

POINT I

RESPONDENTS CONCEDE THERE HAS BEEN NO CESSION OF JURISDICTION FROM THE NATIONAL LABOR RELATIONS BOARD TO THE UTAH STATE LABOR RELATIONS BOARD AS PROVIDED BY SECTION 10 (a), LABOR MANAGEMENT RELATIONS ACT, 1947.

POINT II

THE UTAH STATE LABOR RELATIONS BOARD SHOULD HAVE THE POWER TO ACT IF THE NATIONAL

LABOR RELATIONS BOARD DECLINES TO ASSERT JURISDICTION.

POINT III

UNLESS THE STATE ACTS IN THIS INSTANCE, A VACUUM IN THE LAW IS CREATED WHICH MAY RESULT IN ACTIVITIES PROHIBITED BY BOTH STATE AND FEDERAL LAW.

ARGUMENT

POINT I

RESPONDENTS CONCEDE THERE HAS BEEN NO CESSION OF JURISDICTION FROM THE NATIONAL LABOR RELATIONS BOARD TO THE UTAH STATE LABOR RELATIONS BOARD AS PROVIDED BY SECTION 10(a), LABOR MANAGEMENT RELATIONS ACT, 1947.

Section 10(a), Labor Management Relations Act authorizes the National Labor Relations Board to cede to any state or territorial agency "jurisdiction over any cases in any industry * * * even though such cases may involve labor disputes affecting (interstate) commerce * * * ." In a 1954 decision the United States Supreme Court quoted an N.L.R.B. memorandum filed at the request of the Supreme Court:

> "It is not feasible under the limitations prescribed by the Act to consummate ceding agreements to any states under the proviso."
>
> *United Construction Workers v. Laburnum Corporation,* 347 U.S. 656, (1954) Footnote 2.

The limitations mentioned by the National Labor Relations Board involve the fact that no state has copied the National Labor Management Relations Act. The

result is that state labor relations laws are sufficiently inconsistent with the Labor Management Relations Act to preclude cessions agreements. The situation mentioned in the memorandum remains unchanged. For a state board's comments on resultant problems, see the discussion of New York Labor Relations Board (1949) Annual Report, 26 Labor Relations Reference Manual 69.

Respondents, therefore, concede there has been no cession of jurisdiction from the National Labor Relations Board to the Utah State Labor Board, and under the circumstances of this case, cession is not necessary.

POINT II

THE UTAH STATE LABOR RELATIONS BOARD SHOULD HAVE THE POWER TO ACT IF THE NATIONAL LABOR RELATIONS BOARD DECLINES TO ASSERT JURISDICTION.

The single question presented before this Court for decision is whether the Utah State Labor Relations Board may take jurisdiction of a labor matter affecting interstate commerce when the National Labor Relations Board has declined jurisdiction because of budgetary or other administrative reasons. The issue is a novel one, having never been decided by this tribunal or the United States Supreme Court—appellant's authorities to the contrary, notwithstanding. In *Bethlehem Steel Corporation v. New York Labor Relations Board,* 330 U.S. 767 (1946), the United States Supreme Court stated:

> "The election of the National Board to decline jurisdiction in certain types of cases, for budget-

> ary or other reasons, presents a different problem *which we do not now decide.*" (Emphasis added.)

In *LaCross Telephone Corporation v. W.E.R.B.*, 336 U.S. 18 (1949), the Supreme Court did not pass upon the effect of a discretionary declination of jurisdiction by the National Board. The court in *Gardner v. Teamsters G & H Union,* 346 U.S. 485 (1953), held there was no

> "suggestion that respondents plea of federal jurisdiction and pre-emption was frivolous and dilatory, or that the federal board would decline to exercise its powers once its jurisdiction was invoked."

As recently as 1954, the United States Supreme Court in the case of *Building Trades Council v. Kinard Construction Co.*, 346 U.S. 933, held in a per curium decision:

> "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the court does not pass upon the question suggested by the opinion below on whether the State court could grant its own relief should the Board decline to exercise its jurisdiction."

Since the *Kinard* holding there have been no decisions by the United States Supreme Court on this point and as of this date the issue at hand is without a prior conclusive precedent.

Appellant has placed great weight upon the *Bethlehem, LaCross* and *Garner cases,* supra, in support of

its position. Those cases involved facts creative of potential or direct conflict of state and federal action as distinguished from the situation at hand. Explaining its denial of the concurrent federal-state jurisdiction theory urged by the states in the *Bethlehem case,* the LaCross court held that:

> "the situation [was] too fraught with potential conflict to permit the intrusion of the state agency even though the National Board had not acted in the particular cases * * * . [If the National Board and a state board take jurisdiction of the same labor matter, the] uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between the two boards for supremacy."
> *LaCross Telephone Corp. v. W.E.R.B.,* supra.

In the Garner case, supra, it was held that the federal board had jurisdiction over the matter in dispute because of potential conflict that might otherwise arise between the state and federal governments. The court stated:

> "To avoid facing a conflict between the state and federal remedies, we would have to assume either that both authorities will always agree as to whether the picketing should continue or that the state's temporary injunction will be dissolved as soon as the federal board acts. But experience gives no assurance of either alternative and there is no indication that the statute left it open for such conflicts to arise."

In the *Bethlehem, LaCross and Garner cases,* supra,

and in the case of *Plankinton Packing Company v. W.E.R.B.,* 338 U.S. 953, a direct or potential conflict of federal and state action was involved, and there was no declination of jurisdiction by the federal agency.

The doctrine of "irreconcilable conflict" was stated by Mr. Chief Justice Hughes in the case of *Kelly v. Washington,* 302 U.S. 1 (1937), as follows:

> "When Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation outside that limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

The case before this Court involves neither a potential nor direct and positive conflict of state-federal power, and the rationale upon which state jurisdiction was denied in the *Bethlehem, Garner, LaCross* and *Plankinton* cases is inapplicable here. In the February 1952 issue of Labor Law Journal, Philip Feldblum, general counsel for the New York State Labor Relations Board, in discussing "jurisdictional Tidelands in Labor Relations" states:

> "That rationale [irreconcilable conflict], how-

ever, is inapplicable where the National Board has declined to assert jurisdiction. In such situations, there are no 'potentalities of conflict.' There can be no dual assertion of jurisdiction leading to vain action or mischievous conflict and no doubt as to which board 'is the master.' Thus, there is nothing in the decisions and rationale of the Supreme Court which affirmatively bars the application of state power to labor disputes over which the National Board declines to exercise jurisdiction. On the contrary, certain portions of the *Bethlehem* opinion affirmatively indicate the propriety of state action where federal power is administratively withheld.

The Supreme Court in the *Bethlehem* case, acknowledged that the field of labor relations was not one in which the commerce clause itself pre-empted the field and precluded state action. It recognized that labor relations traditionally were matters of local concern and interest, 'until recently' left entirely to state control, and not so 'intimately blended and intertwined with responsibilities of the national government that its nature alone raises an inference of exclusion.' Pre-emption was implied only because of the 'potentialities of conflict' inherent where the federal and state governments both took hold of the same relationship. Where the National Board as in the *Bethelhem* case, had affirmatively asserted jurisdiction, the Court could not 'deal with this as a case where federal power has been delegated but lies dormant and unexercised."

As was stated in the case of *United Construction Workers v. Laburnum Construction Corp.*, supra:

"* * * The care we took in the Garner Case to

> demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived."

Applying the above reasoning the New York Labor Board, in *Raisch Motors v. New York S.L.R.B.* (1955), 35 L.R.R.M. 1631, took jurisdiction of a case after the National Labor Relations Board had declined jurisdiction. The New York Board stated:

> "There is here no potential conflict, for there is no due claim or assertion of jurisdiction. Thus there is nothing which bars the application of state power to take labor disputes over which the National Board as here declines to assert jurisdiction."

The New York Board urged:

> "Where the National Board refuses to assert jurisdiction, labor disputes must be subject to regulation by the states, or they will not be regulated at all. Labor disputes may or may not substantially affect interstate commerce, but they invariably have an immediate and direct impact upon the local community in which they occur. We do not believe that Congress which granted the National Board discretionary power to decline jurisdiction ever intended to prevent the states, when that occurs, from taking necessary steps to protect their own safety, health and welfare."

Although not cited by appellants, we are aware of the case of *State v. Montgomery Ward & Co.*, 120 Utah 294, 233 P. 2d 685, decided by this Court in 1951. We are in accord with the reasoning and result in that de-

cision and mention it only to distinguish the issue there presented. The *Montgomery Ward* case involved a conflict between the United States Labor Management Relations Act and the Utah statute, authorizing wage checkoffs,—differing from the problem in this instance where there is neither an irreconcilable conflict or even a potential conflict between a federal and state statute or federal and state action. The *Montgomery Ward* conclusion is therefore not applicable here.

In *Bethlehem Steel Corporation v. New York Labor Relations Board,* supra, the court held:

> "When federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulations of its subject, cf. Atlantic Coast Line R. Co. v. Georgia, 234 US 280, 58 L. Ed. 1312, 34 S. Ct. 829, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, Northwestern Bell Teleph. Co. v. Nebraska State R. Commission, 297 US 471, 80 L. Ed. 810, 56 S. Ct. 536, supra; H. P. Welch Co. v. New Hampshire, 306 US 79, 83 L. Ed. 500, 59 S. Ct. 438, supra. The states are in those cases permitted to use their police power in the interval. Terminal R. Asso. v. Brotherhood of R. Trainmen, 318 US 1, 87 L. Ed. 571, 63 S. Ct. 420."

In view of the above authorities it would seem, a fortiori,

that where a federal agency has affirmatively declined jurisdiction over a labor matter, the arguments for allowing state action would be even more convincing than in the case where the federal administrative action might have been taken, but was not. When ~~a~~ an affirmative declination is made, it is certain that the Federal Government does not intend to occupy the area in question.

It has been held that if the Federal Government, through Congress, has occupied a given field of regulation, a state may nonetheless exercise control until the agency charged with enforcing the federal regulations acts to enforce its authority or jurisdiction thereunder. As was stated in the case *Missouri Pac. Ry. v. Larabee Flour Mills,* 211 U.S. 612 (1909):

> "In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed."

See also *Terminal R.R. Ass'n v. Brotherhood of R.R.*

Trainmen, 318 U.S. 1 (1943); *H. P. Welch Co. v. New Hampshire,* 306 U.S. 79 (1939); *Northwestern Bell Telephone Co. v. Nebraska Ry. Comm'n.,* 297 U.S. 471 (1936), and cited therein; *M-L-T Ry. v. Harris,* 234 U.S. 412 (1914); Preston, "Federal 'Pre-Emption' in Labor Relations, — A Reply to Professor Cox," 36 Chi. Bar Record 121 (Dec. 1954); "Labor Law—Federal-State Jurisdiction—A Pre-Emption Question," 27 Rocky Mountain Law Review 330.

In view of the above authority, it is submitted that action by an administrative agency, in effect, amounts to action by Congress where Congress has *empowered,* but not directed the N.L.R.B. to act in cases affecting commerce. The National Labor Relations Board in promulgating its jurisdictional yardsticks, therefore, has marked the extent of congressional jurisdiction in that area. The boards' standards should be given the same effect in defining the limited area to be covered by the federal statute as they would have been accorded had they been included in the federal act at the time of its enactment.

Respondents are aware of the fact that decisions of administrative agencies do not have the stature of force of law that holdings of judicial tribunals are accorded. Nevertheless, very often the practical problems that arise before federal and state agencies present complex situations which that body has become skilled in handling through its experience and constant attention in a given field. For this reason we have included in our

brief citations from state labor boards and the remarks of federal and state labor board personnel.

In order to prevent the creation of a "no man's land," the New York Labor Board and the Wisconsin Board have recently taken cases affecting interstate commerce following the National Labor Relations Board's declination to assert its jurisdiction. See *Raisch Motors v. N.Y.S.L.R.B.,* supra.

The Wisconsin Board, in *Copper v. Utter,* 34 L.L.R.M. 1287, decided May 24, 1954, on the basis of the *Kinard* case, supra, stated:

> "Thus since the highest jurisdictional authority has not determined that state action would be futile in the event the National Labor Relations Board has refused to exercise jurisdiction, we have therefore directed a representation election."

It is significant to point out that in *N.Y.S.L.R.B. v. Wags Transportation System,* 130 N.Y. Supp. 2d 721, cited by appellants, the affirmance of the lower court's denial of enforcement was on the limited ground that there was no clear showing in that case that the National Board would have rejected jurisdiction. Even in view of the *Wags* decision, the *Raisch Motors* ruling by the New York State Labor Board stands.

The National Labor Relations Board general counsel has asserted:

> "In practice the board never has, and I think I can confidently predict it never will interfere to block state action in a situation where the board

chooses to stay its hand because it believes the impact of the activity on commerce would be insubstantial."

* * * *

"Once it is recognized that Congress has authorized the board at its discretion to withhold the full exercise of its jurisdiction, I cannot see any consideration of policy which makes it necessary or desirable to exclude the states from any field that the board properly abnegates in this way."

(See address by N.L.R.B. General Counsel, George J. Bott, May 13, 1954, cited in 34 L.R.R. pages 67-68.)

In the recent case of *Weber v. Anheuser Bush,* 99 L. Ed. 386, ... U.S. ....., Mr. Justice Frankfurter, writing the majority decision for an unanimous court, said, in describing the ruling of the *LaCrosse* case (cited by appellant):

"The Federal Board's machinery for dealing with certification problems also carries implications of exclusiveness, thus a State may not certify a Union as the collective bargaining agent for employees, where the Federal Board, *if called upon,* would use its own certification procedure." (Emphasis added.)

While the Supreme Court does not answer the proposition squarely, respondents contend that the *Weber* holding gives an indication that probably the Supreme Court will allow a state board to act if the National Labor Relations Board does not act.

State labor boards stand ready and willing to handle

matters over which the National Labor Relations Board has declined jurisdiction. In an address before the New York State Federation of Labor, July 21, 1954, Jay Kramer, Chairman of the New York Labor Board, stated:

> "The relinquishment of jurisdiction by the National Labor Relations Board * * * has vastly expanded the sphere of usefulness of the State Labor Relations Board * * * . You should know that this board stands ready and eager to handle that increased case load and that we are prepared to extend and maintain our contribution to collective bargaining, industrial peace and industrial growth in the Empire State."
> (See 34 L.R.R. 261)

POINT III

UNLESS THE STATE ACTS IN THIS INSTANCE, A VACUUM IN THE LAW IS CREATED WHICH MAY RESULT IN ACTIVITIES PROHIBITED BY BOTH STATE AND FEDERAL LAW.

Respondents are aware of the case of *Retail Clerks Local No.* 1564 *v. Your Food Stores,* 225 F. 2d 659, (1955), cited by appellants. With the results of that decision we cannot agree, for to accept the conclusion therein would be to perpetuate a vacuum in the field of labor relations over which no legal authority would have jurisdiction.

It would seem paradoxical to hold that because the National Labor Relations Board once held an election in the case before us, the Union is beyond the control of the Utah State Labor Relations Board, because following that election the National Labor Relations Board

declined to assert jurisdiction on the grounds that the employer's business was predominantly local in character and would not add up to the standards necessary to meet the National Board's test for invoking jurisdiction.

By its ruling on July 21, 1954, in declining the instant case, the National Labor Relations Board in effect held that the employer's business impact on interstate commerce is so trivial as to warrant leaving disputes like it to local or state control.

While many management or labor groups might argue the virtue of appellant's position, thereby purposely creating a "vacuum" in labor activities, the union involved here prefers that all areas of labor-management relations be governed by rules of law and order. To accept appellant's argument is to concede that under the circumstances that were clearly demonstrated in this case, a "no-man's land" must exist at a state level, because the National Board refuses to act. Labor relations and industrial peace cannot exist in a void and should not be governed by rules of the "jungle." A state's failure to exercise its jurisdiction might result in labor-management activities, in the future, not regulated by federal law, nevertheless prohibited by state law, that would bar state enforcement and permit a climate of industrial relations that runs contrary to all public policy.

Conceivably either management or labor might from time to time gain by the creation of a void in the labor

field, but neither side could be totally immune from direct injury. The sword would cut both ways. But whether management or labor could better its position in a "no-man's" situation is of course of secondary importance. Ultimate injury to the community must of necessity be the primary concern. Public welfare, health and safety have every thing to gain by an application of law and order in this instance. The creation and perpetuation of a labor relations "no-man's land" could produce nothing less than retrogression in the field of labor relations, with the resultant harm reflected in the lives and progress of a community.

It is inconceivable that the National Congress intended that a vacuum should result from an application of federal labor legislation.

Respondents seek the Court's indulgence in summarizing its position by referring to a portion of an article appearing in 50 North Western Law Review 190 (1955). A symposium, dealing with "National Labor Relations Board Jurisdictional Standards and State Jurisdiction" made the following lengthy, but convincing appraisal as follows:

> "In light of the preemptive trend of the law in this area, questions have naturally arisen as to what rights, if any, the states now possess in this 'tidelands' area which extends from the farthest reach of the Board's power under the Commerce Clause (the constitutional limitation) inward to the new line drawn by the Board's most recent, self-imposed jurisdictional 'yard-

sticks' (the *discretionary* limitation). Must it be assumed that where there has been a removal of state power because of the preemptive effect of the national act, followed by a refusal of the National Board to exercise a part of this resulting power, it is necessary that a formal cession agreement (the only express method of returning power to the states recognized by the federal act) be executed as a condition precedent to any state agency stepping into the unoccupied area thus created? Or, to put it negatively, when the National Board declines to exercise its exclusive jurisdiction to any and, at the same time, has not formally ceded its jurisdiction to any state agency, is a 'no man's land' created wherein the federal government will not act and the state governments *cannot* act?

"The Supreme Court, although it has taken notice of the problem, has expressly reserved judgment until such time as the issue is squarely presented to it.

"Should the Court eventually be required to resolve the question, it would appear that implications arising from the express statutory provision for cession agreements would be the most difficult obstacle for the proponents of state power to overcome. Undoubtedly, it would be persuasively argued that this statutory enactment withdrew from the National Board any power to cede jurisdiction to the states on its own terms, substituting therefor the rigid express cession agreement provisions of the act. Thus it could be contended that if the Board, be merely declining to assert jurisdiction, could pave the way for state action, the statutory requirement would be rendered meaningless. Moreover, advocates of complete federal preemption might justify the

possibility of a resultant 'no man's land' by arguing that Congress was attempting to force the adoption of state laws patterned after the national act and thus intentionally made conformity the price which the states must pay if they wish to take jurisdiction over disputes in the 'tidelands' area.

"However, the stronger arguments appear to be on the side of those favoring state power. *Logically, it would seem that the statutory provision for cession agreements was intended to apply only in those areas where the Board does consistently assert jurisdiction, but where a qualified state agency, operating under labor legislation identical to the national act, is available to assume a part of the burden.* Only in that situation, where the federal government clearly wishes to have policies consonant with the national act applied, is the cession agreement necessary in order to avoid conflict and assure uniformity. In addition, it would appear that the preemptive rationale of the *Bethlehem, LaCrosse* and *Garner* cases, based as it is upon the fear of potential conflict where there is concurrent jurisdiction, is also only applicable in those cases where the National Board will assert its power and does not extend to those disputes over which the Board has said it will refuse jurisdiction.

"In the latter situations, there is no possibility of dual assertion of jurisdiction and hence no danger of conflicting results.

"In addition, the following more general arguments can be advanced as reasons for permitting state action:

"(1) The NLRA is based upon the federal power to regulate interstate commerce. The Su-

preme Court, in construing statutes enacted under the Commerce Clause, has stated that it will find no suspension of the exercise of the reserve powers of a state except so far as the Congressional intent to do so is clearly manifested. Since there appears to be no clear manifestation of Congressional will to prohibit the exercise of state authority in the 'tidelands' area, the states should be permitted to assert jurisdiction.

"(2) The Supreme Court has held that in cases where federal administrative regulation is slight, but extensive regulation would be possible, or where regulation is more detailed, ~~both~~ but the federal agency has not acted in regard to a separable segment of the area covered by the federal statute, the states may step in and exercise their powers. If the Court will permit the states to absorb the vacuum in these situations, there would seem to be an even clearer case for the exercise of state power where the federal agency (the National Board here) has not only failed to act but has expressly stated that it *will not* act in regard to a distinct and separable segment of the area covered by the federal act, such as that created as a result of the Board's new jurisdictional policies.

"(3) Congress, in its original legislation in this area, could have occupied only a limited area, thereby leaving local and borderline cases to state regulation. Rather than directly exercise this line-drawing power, however, Congress left it to the Board in the form of a statutory provision *empowering,* but not directing the Board to act in cases affecting commerce. Thus, the National Board, in exercising this discretion, is actually filling in the details of the Congressional policy. The Board's jurisdictional standards

should therefore be accorded the same effect, in thus marking off the limited area to be covered by the federal act, that they would have received had they been included in the federal act at the time of its passage.

"It thus appears that the various legal arguments available weigh heavily in favor of the exercise of state power in the 'tidelands' area. Moreover, *policy considerations would seem to motivate against the creation of a 'no man's land' wherein labor disputes, not of sufficient importance to warrant National Board attention, but nonetheless a source of real concern to the communities in which they occur, would be totally unregulated.* It would therefore appear that should this important question reach the Supreme Court, a decision favoring the assertion of state powers could probably be anticipated." (Emphasis added.)

CONCLUSION

In view of the foregoing argument and authority, respondents urge that this Court affirm the Utah State Labor Relations Board's order in full, make such other appropriate order as will enforce the board's decree, and grant such further relief as is just under the premises.

Respectfully submitted,

E. R. CALLISTER
Attorney General
RAYMOND W. GEE
Assistant Attorney General
A. W. SANDACK
Attorneys for Respondents